APPENDIX A

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October 23, 1957.

WARNER W. GARDNER, ESQ.,
734 15th St., N. W.
Washington 5, D. C.

Re: *Federal Maritime Board, Petitioner v. Isbrandtsen, United States, and Secretary of Agriculture, Respondents (No. 73) and Japan-Atlantic & Gulf Frt. Conf., Petitioner, v. United States, Federal Maritime Board, Isbrandtsen, and Secretary of Agriculture, Respondents (No. 74)*

Proposal of Board's Special Counsel to file with the Court certain "Extracts" from "so-called Alexander Report".

Dear Mr. GARDNER:

I have your letter of October 21, 1957, addressed to Mr. Elkan Turk, attorney for the Conference, and to me, as attorney for Isbrandtsen, with copies to the Solicitor General of the United States and to Mr. E. Robert Seaver, General Counsel of the Federal Maritime Board, concerning your plan to file with the Supreme Court your selected "extracts" from the "so-called Alexander Report". *At the outset, I inform you that I will object most strenuously to any such improper and unprecedented filing.*

The caption of your letter of October 21, 1957, setting forth these two dockets, is abbreviated so as to show Isbrandtsen as the only Respondent in Docket No. 73 and the United States as the only Respondent in Docket No. 74. Actually, there are five (5) parties to these proceedings.

These proceedings are now before this Court on a Joint Appendix, which constitutes the entire Record before the Court, which Joint Appendix was laboriously worked out in the Court of Appeals, below, before you were retained by the Board as its "Special Counsel". I cannot comprehend how you can conceivably claim, at this late date, any right to expand this "Joint Appendix", after briefs have been filed by all the parties, and without the consent of *all* of the parties *including private parties*. You state in your above-mentioned letter of October 14, 1957, that this material—which is no part of the "Record" in the proceedings—is to be submitted merely as a "Joint Appendix to the briefs of the two Government agencies". I am unaware of the demotion of the Departments of Justice and Agriculture (which Department is also a Respondent in the Proceedings) to the status of "Government agencies", and I am sure they will be surprised to learn of your self-assumed demotion.

In any event, I point out that the time for all parties to file their briefs, and any appendices thereto, has expired. Isbrandtsen's brief, as a respondent in each proceeding, has been filed, and we have replied to the briefs of the Board and the Conference. We would, of course, have been entitled to reply to any appendix which you had attached to your brief, and we certainly would have replied to any attempt to submit "extracts" from a "summary" of *evidence* compiled by a Commit-

tee staff member, which you mistakenly call the "Alexander Committee *Report*". Furthermore, I do not believe that your maneuver of presenting such an appendix, *after* briefs have been filed, could be successful in foreclosing my formal response thereto. The only way that such a "Joint Appendix" could be filed, at this date, that I know of, would be with the consent of *all* of the parties, and you have known for some time that my consent has been refused.

Undoubtedly you recall your telephone call to me, with reference to your proposed presentation of your "extracts" from the "so-called Alexander Report" to the Supreme Court as a "Joint Appendix". As I informed you, I object to any such presentation in the form of a Joint Appendix. Fundamentally, I object to any expurgated version of any public *document* being presented to the Supreme Court in an effort to spoon feed to the Court material which the Court can well read in its entirety in the Court's library. I should consider such an effort an affront to the Court of the same sort as if a party should attempt to include selected extracts from Judicial decisions *in any Appendix*. More importantly, however, the document which you represent as the "so-called Alexander *Report*" is in reality *not in any sense a Report of a Congressional Committee*, and, even though I am convinced that this document lends no support to your position, I would never consent to have such a mere document dignified as an important and relevant authority in this case. As I have explained in the attached memorandum, the document from which you take your extracts, was only a "summary" of the *evidence*, presented to a House Committee before any legislation was drafted or proposed, and *only volume IV* thereof was printed *by spe-*

cial permission of the House of Representatives as H. Doc. No. 805, 63d Cong., 2d Sess., despite the erroneous citation on the title page of your "extracts" giving that citation for all *four* volumes.

You have also sent me a copy of your letter of October 14, 1957, addressed to the Solicitor General, in which you refer to "telephone conversations" with Mr. Pollock, an Assistant Solicitor General, and you also enclose a copy of your "extracts" from "the so-called Alexander Report." Of course, you must be aware that all Briefs, now filed by the Conference, the Board, Isbrandtsen and the Departments of Justice and Agriculture, already contain many references to this so-called "Report", affording the Court whatever "help" it may need in analyzing the relevancy and materiality, if any, of this misrepresented document. The function of briefs to the Court, as far as I know, is to summarize the arguments of the parties, supplying supporting references and citations which *the Court can check* in as much detail as it may wish. I cannot appreciate your alleged concern, therefore, for the Court's labors, and your transparent suggestion that these "extracts", from a public document available in the libraries, will "help" the Court without any further necessity of the Court to resort to its "library stacks", a travail from which you apparently assume your "extracts" will relieve the nine Justices and their many assistants.

In your said letter to the Solicitor General you also state that 102 typewritten pages of "extracts" which you enclose are those remaining after you have stricken "33 pages" which you had proposed to insert. Naturally, one can assume that your expurgatory selection was done on the basis of those pages which you consider

most favorable to your position, and that the some two thousand pages which you have not selected, as well as the 33 pages you have stricken, would not be favorable to your new client. You state also that copies of your "extracts" will be dispatched "to counsel for the *private* parties, Messrs. O'Connor and Turk, for their information". While I acknowledge your kindly gesture, it is of no assistance to me, I can assure you, because I am still able to read public documents in their unexpurgated form in the library, as I know the Court can do. Your statement, furthermore, is the first time I have ever seen it contended, in writing, at least, that "Goverment agencies" (which normally come into cases of this sort only as *amici curiae*) have any higher standing or greater privileges before the Supreme Court of the United States than "private parties", who are the real parties in interest in the proceeding.

I must accept some of the blame myself, for not sooner completely exploding the three-decade old myth, about this so-called "Alexander Report" being worthwhile "legislative history". My several previous briefs, however, relating to the exclusive-patronage system, will corroborate my present attitude as being one of long standing.

Just recently, I have gone to some further trouble to establish conclusively that this "so-called Alexander Report", from which you extract selected excerpts, *is not a Congressional Committee Report*. The entire four volumes of Committee Proceedings were compiled by a Staff Member hired by the Committee, except possibly for ten pages of "recommendations" at the very end of the *fourth* volume. These four volumes, other than the recommendations, were described by the writer,

Professor S. S. Huebner, as "*a summary of the data gathered by the committee*". The fourth volume of Committee Proceedings was published as H. Doc. 805, 63d Cong., 2d Sess., only with special authorization of the House of Representatives, *which authorization would not have been necessary if the document had been a legislative report.* Furthermore, this "*summary*" *of evidence* compiled by Professor Huebner, which you erroneously refer to as the "Alexander Report", was not specifically endorsed by any member of the Committee, which is not surprising because when volume IV, was printed in 1914, fifteen (15) of the twenty-one (21) members of the then House Committee had not been members of that Committee when the hearings were conducted. The "summary" of Committee proceedings should properly be called "*Professor Huebner's Report*".

There were in fact only two actual Congressional Committee *Reports*, those accompanying the final Shipping Bill, H.R. 15455, *viz.*, House Report No. 659, 64th Cong., 1st Sess., May 9, 1916 (the *real* Alexander Committee Report), and Senate Report No. 689, 64th Cong., 1st Sess., July 19, 1916, *which Reports were printed without any special authorization.* In order to be "helpful" to you, and perhaps to the Court as well, I have prepared a memorandum, attached hereto, which explains the real status of *Professor Huebner's Report*, which you erroneously call the "Alexander Report", as well as the facts concerning the really relevant "legislative history" of the Shipping Act. I am not so presumptuous as to believe that the Court requires my assistance in extracting portions of this real legislative history. Rather, I am fully content and unafraid to have the Justices read these matters, in their entirety.

if they should desire, or to check the references which I have made.

I am giving you my reactions to your attempted presentation of "extracts" from a document that has very little standing as any legislative history of the Shipping Act—even if such exploration of "legislative history" were proper, which I believe it is not—in order to save my Government any further expense of additional research and legal fees in discovering and segregating these "extracts" and in having them printed in great number. I have attempted to reach Mr. Pollock, by telephone, to convey my objections to him (which attitude I had already stated to you), but I learned that he was at home, ill in bed.

Yours very truly,

JOHN J. O'CONNOR,
Attorney for Respondent,
Isbrandtsen Company, Inc.,
Respondent in Dockets 73 and 74.

Copies to Clerk of Court and Counsel for all parties and generally.

(7770-1)